UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MILAN PAUL PAKES,

Petitioner,

v.

JAMES A. YATES,

Respondent.

_____/

No. C-04-5294 VRW (EMC)

REPORT AND RECOMMENDATION RE PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

(Docket No. 1)

Petitioner Milan Paul Pakes has filed a petition for writ of habeas corpus seeking to overturn his conviction for felony endangerment of a minor, *see* Cal. Pen. Code § 273a(a), in Santa Clara Superior Court. Mr. Pakes argues that ineffective assistance of trial counsel Miguel Chacon led him to plead guilty to the offense, which became his third "strike" under California Penal Code § 667 for sentencing purposes. On September 27, 2006, Judge Walker issued an order referring the matter to a magistrate judge for an evidentiary hearing to determine (1) whether Mr. Pakes received constitutionally deficient advice from Mr. Chacon and (2) whether Mr. Pakes was prejudiced by the advice. In the referral, Judge Walker also instructed that the magistrate judge should prepare proposed findings of fact and recommended disposition of the issues identified in his September 27 order.

Having considered the evidence presented, both testimonial and documentary, as well as all other evidence of record and the argument of counsel, the Court hereby recommends that Mr. Pakes's petition be **GRANTED**.

I. FACTUAL BACKGROUND & PROCEDURAL HISTORY

A. Events Leading to Mr. Pakes's Conviction

The following factual background is reflected in Judge Walker's order of September 27, which found that Mr. Pakes was entitled to an evidentiary hearing. At the time of the events that led to the conviction of Mr. Pakes, he was on parole for two counts of committing lewd and lascivious acts with a minor. *See* Docket No. 10, Ex. 1 (CT 127-28); *see also id.* (CT 118-19). Mr. Pakes was subject to a special parole condition under which he was not permitted to be alone with a minor female. *See id.* (CT 119). Mr. Pakes had already suffered two parole violations unrelated to the special condition: one in February 2000 for possession of a syringe/needle and possession of a marijuana cigarette and another in September 2001 for a positive urine specimen for cocaine usage. *See id.* (CT 128).

At the preliminary examination of Mr. Pakes, evidence was presented concerning the events that led to his conviction. That evidence -- consisting largely of the testimony of Adriene Doe, Officer David Gonzalez, and Sgt. Robert St. Amour -- reflected the following.

Mr. Pakes met Adriene Doe, then twelve years old, at a swimming pool in the summer of 2001. *See* Resp.'s Ex. 2 (Prelim. Exam. at 5-7) (testimony of Adriene). Mr. Pakes befriended Adriene as well as her family and visited their house daily. *See id.* (Prelim. Exam. at 8-9). That summer, Mr. Pakes started to teach Adriene how to drive by letting her drive his truck around the streets of the mobile home park where he and her family lived. *See id.* (Prelim. Exam. at 9-11) (testimony of Adriene). The seatbelts in the truck did not work. *See id.* (Prelim. Exam. at 10, 12) (testimony of Adriene). During one of the driving lessons, Mr. Pakes asked Adriene for a kiss on the cheek. *See id.* (Prelim. Exam. at 12-13) (testimony of Adriene). Adriene refused. *See id.* (Prelim. Exam. at 13) (testimony of Adriene).

Several months later, in December 2001, Mr. Pakes was visiting Adriene and her family and, when her parents were out of the room, he gave her some money. *See id.* (Prelim. Exam. at 14-15) (testimony of Adriene). Mr. Pakes told Adriene not to tell anyone because he was afraid that they would ask him for money. *See id.* (Prelim. Exam. at 15) (testimony of Adriene).

Soon thereafter, on December 15, 2001, Mr. Pakes asked Adriene to accompany him to a chimney-sweeping job at a private residence. *See id.* (Prelim. Exam. at 16-17) (testimony of Adriene). The two drove to the work site in Mr. Pakes's truck which did not have working seatbelts. *See id.* (Prelim. Exam. at 17) (testimony of Adriene). Adriene helped Mr. Pakes load and unload the truck, for which Mr. Pakes paid her $10. *See id.* (Prelim. Exam. at 18-10) (testimony of Adriene).

On the way back to Adriene's house, Mr. Pakes was driving northbound on Highway 87 in San Jose, California. *See id.* (Prelim. Exam. at 19) (testimony of Adriene); *id.* (Prelim. Exam. at 49) (testimony of Officer Gonzalez). Mr. Pakes rear-ended a sports utility vehicle, which was being driven by an off-duty police officer, David Gonzalez. *See id.* (Prelim. Exam. at 49-50) (testimony of Officer Gonzalez). According to Officer Gonzalez, he started to pull off on the shoulder of the highway to exchange information and find out how badly his car was damaged. *See id.* (Prelim. Exam. at 50) (testimony of Officer Gonzalez). "And then the car that hit me kept -- pulled up alongside me, because I pulled to the left shoulder of the road. I looked over, pointed at him and said, are you going to pull over, and he just kind of said, oh, yeah, I'm going to pull over, hold on. He had his window rolled down, and then just sped off." *Id.* (Prelim. Exam. at 50) (testimony of Officer Gonzalez).

Officer Gonzalez called the police dispatch from his cell phone and asked for assistance in stopping the driver who had hit him. *See* Resp.'s Ex. 2 (Prelim. Exam. at 52) (testimony of Officer Gonzalez). Mr. Pakes drove away from the scene of the accident at 50 mph on the left shoulder, with Officer Gonzalez following at 35 mph. *See id.* (Prelim. Exam. at 51) (testimony of Officer Gonzalez). When traffic started to clear up, Mr. Pakes pulled back on to the highway, driving at a much faster speed than the speed of traffic, and started making unsafe lane changes, cutting other drivers off. *See id.* (Prelim. Exam. at 52-53) (testimony of Officer Gonzalez). At some point, Mr. Pakes merged from Highway 87 on to southbound Interstate 280, where he continued to make unsafe lane changes. *See id.* (Prelim. Exam. at 53-54) (testimony of Officer Gonzalez). Mr. Pakes then exited at Seventh Street. *See id.* (Prelim. Exam. at 54) (testimony of Officer Gonzalez).

At the beginning of the chase, Mr. Pakes told Adriene to duck down. *See id.* (Prelim. Exam. at 21, 25) (testimony of Adriene). During the chase, Adriene repeatedly told Mr. Pakes to take her home and to stop. *See id.* (Prelim. Exam. at 21-23) (testimony of Adriene).

While Officer Gonzalez was following Mr. Pakes, Sgt. Robert St. Amour was monitoring the police radio and heard the broadcast about the hit-and-run involving Mr. Pakes and Officer Gonzalez. *See id.* (Prelim. Exam. at 59-60) (testimony of Sgt. St. Amour). According to Sgt. St. Amour, he was the first officer in a marked police car to observe Mr. Pakes's truck. *See id.* (Prelim. Exam. at 60) (testimony of Sgt. St. Amour). However, Adriene testified that there was more than one marked police involved in the chase. *See id.* (Prelim. Exam. at 23-24) (testimony of Adriene).

Sgt. St. Amour saw Mr. Pakes's truck going the wrong way on a one-way street, *i.e.*, northbound on southbound Second Street. *See id.* (Prelim. Exam. at 60) (testimony of Sgt. St. Amour). According to Adriene, while Mr. Pakes was driving the wrong way on the one-way street, there was oncoming traffic -- "two or three cars coming" -- and Mr. Pakes had to swerve to avoid the cars. *See id.* (Prelim. Exam. at 24-25) (testimony of Adriene). Sgt. St. Amour, however, did not mention any oncoming traffic or any near crash. According to Sgt. St. Amour, when he saw Mr. Pakes's truck, he turned "onto Keyes from Monterey, which is the next street to the left of 2nd Street," activated his red lights and siren, and placed his police car "somewhat in [the] path of the pickup [truck] to stop [Mr. Pakes] from going further northbound against traffic [on Second]. [Mr. Pakes] bypassed me, made a right turn between the curb and my vehicle onto Keyes Street." *Id.* (Prelim. Exam. at 60) (testimony of Sgt. St. Amour).

Sgt. St. Amour pursued Mr. Pakes on Keyes, still using his red light and siren. *See id.* (Prelim. Exam. at 61) (testimony of Sgt. St. Amour). Mr. Pakes made a left from Keyes on to northbound Third Street, then made a left on to Virginia, and finally made a left on to southbound Second Street. *See id.* (Prelim. Exam. at 61-62) (testimony of Sgt. St. Amour). During this time, Mr. Pakes was driving about 35 mph in a 30 mph zone. *See id.* (Prelim. Exam. at 63) (testimony of Sgt. St. Amour). Mr. Pakes eventually pulled his truck over at 868 South Second Street. According to Sgt. St. Amour, "[Mr. Pakes] drove up onto the curb, parked the vehicle almost on the sidewalk." *Id.* (Prelim. Exam. at 62) (testimony of Sgt. St. Amour). Mr. Pakes then exited his truck and ran up

to the house at 868 South Second Street. *See id.* (Prelim. Exam. at 63) (testimony of Sgt. St. Amour). Sgt. St. Amour parked his police car in front of the truck and ordered Mr. Pakes to stop but Mr. Pakes kept running. *See id.* (Prelim. Exam. at 63) (testimony of Sgt. St. Amour). Sgt. St. Amour chased Mr. Pakes to the stairs of the house where he caught Mr. Pakes and placed Mr. Pakes under arrest. *See id.* (Prelim. Exam. at 63) (testimony of Sgt. St. Amour).

B. State Proceedings

The initial complaint filed against Mr. Pakes on December 19, 2001, charged him with two felonies and a misdemeanor. The felonies charged were (1) annoying or molesting a child under age 18 in violation of California Penal Code § 647.6(c)(2) and (2) endangering or injuring the health of a child in violation of California Penal Code § 273a(a). *See* Docket No. 10, Ex. 1 (CT 75-76). The misdemeanor charged was hit and run causing property damage, a violation of California Vehicle Code § 20002(a). *See id.* (CT 76). Three prior convictions were also alleged in the complaint, two of which were serious felony prior convictions. *See id.* (CT 76-77). Subsequently, on July 18, 2002, an information was filed charging Mr. Pakes with the same and further charging Mr. Pakes with a felony count for evading the police in violation of California Vehicle Code § 2800.2(a). *See id.* (CT 80-83); *see also* Tr. at 157 (testimony of Mr. Chacon).

On September 5, 2002, Mr. Chacon filed on behalf of Mr. Pakes a "995 motion"[1] to set aside the first count of the information, which charged Mr. Pakes with a violation of California Penal Code § 647.6(c)(2). *See* Docket No. 10, Ex. 1 (CT 94). A hearing on the motion was held on September 20, 2002, at which time the motion was granted. *See id.* (CT 106).

Thereafter, on October 8, 2002, the date set for trial on the case, Mr. Pakes entered a plea bargain pursuant to which he pled guilty to the felony count for child endangerment in exchange for dismissal of the felony count for evasion of the police and the misdemeanor count. *See id.* (CT 109). Mr. Pakes also admitted the three prior convictions. *See id.*

Mr. Chacon then filed on behalf of Mr. Pakes a *Romero* motion, *see People v. Superior Court (Romero)*, 13 Cal. 4th 497 (1996), asking the court to strike one of his two serious felony prior

[1] *See* Cal. Pen. Code § 995 (providing when an indictment or information must be set aside).

convictions. *See* Docket No. 10, Ex. 1 (CT 112). The *Romero* motion was denied on April 18, 2003. *See id.* (CT 151). That same day, Mr. Pakes was sentenced to 26 years to life. *See id.* (CT 152). Mr. Pakes received 25 years to life for his child endangerment conviction and one year for his prison prior. *See id.*

C. Federal Habeas Proceedings

In his federal habeas petition, Mr. Pakes argues that he received ineffective assistance of counsel from Mr. Chacon because Mr. Chacon advised him to enter a plea bargain that was of no value to him. Mr. Pakes contends that the plea bargain was worthless for four reasons:

(1) As a matter of law, he was not guilty of evading the police under California Vehicle Code § 2800.2(a).

(2) California Penal Code § 654 would have barred multiple punishment for both evading the police and endangering a child.

(3) He had a viable defense to the charge of endangering a child (*i.e.*, he could defend by seeking conviction for the lesser-included offense of misdemeanor child endangerment). *See* Cal. Pen. Code § 273a(a)-(b).

(4) Mr. Chacon falsely told him that Judge Edward Lee is a lenient judge likely to grant a *Romero* motion (which would result in less than a life sentence) when, in fact, Judge Lee is a harsh judge and there was no chance that Judge Lee or any other judge would grant *Romero* relief given Mr. Pakes's record and the circumstances underlying the current charges.

On September 27, 2006, Judge Walker issued an order granting Petitioner an evidentiary hearing and referring Mr. Pakes's habeas petition to a magistrate judge for an evidentiary hearing on the ineffective assistance of counsel claims. *See* Docket No. 21. As discussed below, the detailed analysis of Judge Walker's order established a specific framework for the evidentiary hearing and for the findings and recommendations to be rendered by this Court.

This Court conducted the evidentiary hearing on December 11, 12, and 14, 2006. The Court heard witnesses who testified in support of Mr. Pakes's case in chief: Mr. Chacon, Milan Philip Pakes (Mr. Pakes's father), Shawn Pakes (Mr. Pakes's brother), Marilyn Pakes (Mr. Pakes's mother), Mr. Pakes himself, and Allen Schwartz (a criminal defense attorney). The Court also heard

witnesses who testified in support of the state's case in chief: Mr. Chacon and James Gibbons-Shapiro (the main prosecutor at the trial level).

With respect to Mr. Schwartz, Mr. Pakes offered -- and the Court accepted -- him as a *Strickland* expert, *i.e.*, an expert on ineffective assistance of counsel claims. *See* Tr. at 289. The Court's acceptance of Mr. Schwartz as such an expert was largely based on his experience as a criminal defense attorney (23 years of practice in Santa Clara County) who has tried approximately 75 jury trials, including 25 or so three strike cases and 15-20 two strike cases. *See* Tr. at 279-80. The Court further noted that Mr. Schwartz has previously been qualified as a *Strickland* expert in Santa Clara Superior Court. *See* Tr. at 281.

II. LEGAL STANDARD

In his September 27 order, Judge Walker set out the legal standard applicable to Mr. Pakes's habeas petition. As noted by Judge Walker, Mr. Pakes's habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, a district court may grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court only if the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "Where, as here, the state court reached the merits of a habeas petition but provided no rationale for its decision, the [district] court determines whether the state decision was 'objectively unreasonable' based on an independent reading of the record." VRW Order of 9/27/06, at 10 (quoting *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).

A petitioner asserting a claim of ineffective assistance of counsel must establish two things. First, he must establish that counsel's performance was deficient, *i.e.*, that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Second, he must establish that he was prejudiced by counsel's deficient performance, *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Where a petitioner claims ineffective assistance of counsel with respect to a guilty plea, he "may generally only attack the voluntary and intelligent character of [the] guilty plea by showing that the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases." VRW Order of 9/27/06, at 10 (citing, *inter alia*, *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)). Prejudice is established by a showing that there is a reasonable probability that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. *See Hill*, 474 U.S. at 57-59. The petitioner need not prove he would have been acquitted at trial.

III. DEFICIENT PERFORMANCE

Judge Walker's order of September 27 summarizes Mr. Pakes's ineffective assistance claims as follows:

> Reduced to their essence, petitioner's four arguments each state that his trial counsel inaccurately predicted the sentence petitioner would likely receive if he had been convicted at trial compared to the twenty-six-to-life sentence he actually did receive in exchange for his guilty plea.

VRW Order of 9/27/06, at 11. As Judge Walker indicated, Mr. Chacon's performance was deficient if these predictions were "'gross mischaracterization[s] . . . combined with . . . erroneous advice on the possible effects of going to trial.'" VRW Order of 9/27/06, at 11 (quoting *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986)).

A. Felony Count for Evasion of the Police (Cal. Veh. Code § 2800.2(a))

As Judge Walker noted in his September 27 order, "§ 2800.2 makes it a felony to drive a vehicle in 'willful or wanton disregard for the safety of persons or property' while fleeing or attempting to elude a 'pursuing peace officer' in violation of California Vehicle Code § 2800.1." VRW Order of 9/27/06, at 12 (quoting § 2800.2(a)). Under § 2800.1, it is a misdemeanor to willfully flee a "pursuing peace officer's motor vehicle" when, *inter alia*, "[t]he peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp." Cal. Veh. Code § 2800.1(a). Under § 2800.2(b), "a

willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs." *Id.* § 2800.2(b).

Mr. Pakes argues first that Mr. Chacon's performance was deficient because Mr. Chacon failed to tell him that, as a matter of law, he could not have been convicted of felony evasion of the police, *see* Cal. Veh. Code § 2800.2(a), the charge dropped by the prosecution in exchange for the plea. The plea bargain was therefore worthless -- *i.e.*, at trial, Mr. Pakes could only have been convicted of felony child endangerment, *see* Cal. Pen. Code § 273a(a), the charge to which he pled guilty.

As Judge Walker noted in his order of September 27, the success of this argument largely depends on the definition of "pursuing peace officer" for purposes of § 2800.2(a). Judge Walker concluded that the state's argument regarding the meaning of "pursuit" was not persuasive. "[T]he plain meaning of 'pursue' is follow, suggesting a pursuit from behind. . . . [Section] 2800.1(a)(1)'s requirement that the police vehicle's lights be visible 'from the front' would be meaningless if the pursuing vehicle were not actually behind the pursued." VRW Order of 9/27/06, at 14. Judge Walker continued: "Assuming that no officers were pursuing petitioner until after he passed St. Amour's roadblock, and because neither party contends that petitioner's driving caused damage to property, a conviction for violating § 2800.2 would only have been possible if petitioner violated three or more provisions leading to a point count under California Vehicle Code § 12810." VRW Order of 9/27/06, at 14. Mr. Pakes admitted only two such traffic violations, namely, driving 35 mph in a 30 mph zone and failing to restrain a minor in violation of California Vehicle Code § 27360.5. *See* VRW Order of 9/27/06, at 14-15. The state argued that there were three additional traffic violations, but Judge Walker disagreed. *See* VRW Order of 9/27/06, at 15-16. Judge Walker therefore agreed with Mr. Pakes that, given the weaknesses in the prosecution's case, "as a matter of law, convict[ion] [under] § 2800.2 was a long shot on these facts," in particular, if "no officers were pursuing [Mr. Pakes] until after he passed [Sgt.] St. Amour's roadblock." *Id.* at 14, 16.

At the evidentiary hearing herein, no new facts were introduced. Despite Adriene's testimony at the preliminary hearing that she and Mr. Pakes were pursued by several police cars prior to Sgt. St. Amour's pursuit, the state did not present any evidence establishing that "'multiple police cars' were pursuing [Mr. Pakes] before he passed [Sgt.] St. Amour's roadblock."[2] VRW Order of 9/27/06, at 14 (stating that "[t]his factual issue may be further developed at the evidentiary hearing"). Indeed, Mr. Gibbons-Shapiro, the prosecutor at the trial level, admitted that, other than Adriene's uncorroborated testimony, he presented no evidence at the preliminary examination -- nor did he have any evidence in his possession -- which would show that there were other police cars in pursuit. *See* Tr. at 50 (testimony of Mr. Gibbons-Shapiro). The police reports filed by the involved officers make no mention of other police cars in pursuit. *See* Pet.'s Exs. O-T (police reports); *see also* Tr. at 309 (testimony of Mr. Schwartz). If police officers in marked cars had been giving chase before Sgt. St. Amour, reports from these police officers would likely have been filed; at the very least, these officers would have been mentioned in the police reports of record.[3] They were not. In light of the above, this Court finds that there were no marked police cars pursuing Mr. Pakes until Sgt. St. Amour started giving chase. Thus, consistent with Judge Walker's September 27 order, and Judge Walker's interpretation of § 2800.2, conviction under § 2800.2(a) was at best a long shot.

At the evidentiary hearing herein, Mr. Gibbons-Shapiro (the prosecutor) took issue with Judge Walker's construction of "pursuit" for purposes of § 2800.2(a). *See* Tr. at 554-56 (testimony of Mr. Gibbons-Shapiro). However, he did not offer any legal authority in support of his position, nor did, for that matter, the state. Moreover, even if it could not be conclusively determined that Judge Walker's construction of "pursuit" was assured, there was at the very least a very strong argument to support that construction of the term. Even Mr. Gibbons-Shapiro testified that what

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[2] Nor did the state present any evidence as to additional traffic violations (warranting a point) that were committed by Mr. Pakes or any additional evidence as to driving by Mr. Pakes that rose to the level of willful or wanton disregard for the safety of persons or property. Mr. Schwartz, an expert who testified on Mr. Pakes's behalf, credibly testified that a conviction under § 2800.2(a) was unlikely given that there were not three traffic violations (warranting a point) after the pursuit began and that there was no willfulness or wantonness. *See* Tr. at 290-91 (testimony of Mr. Schwartz).

[3] As explained during the preliminary examination, Officer David Gonzalez -- whose car Mr. Pakes hit -- was not in a marked police car. In fact, he was not on duty. Resp.'s Ex. 2 (CT 49-50).

constituted "pursuit should have been left to the jury to decide and that Mr. Chacon could have argued to the jury that "'pursuit' commenced only after St. Amour started giving chase." *See* Tr. at 557-58 (testimony of Mr. Gibbons-Shapiro). Therefore, as Judge Walker found, at the very least, Mr. Chacon should have informed Mr. Pakes of the "'dearth of legal authority'" on the interpretation of "pursuit" under § 2800.2(a). VRW Order at 9/27/06, at 17 (quoting *People v. Maguire*, 67 Cal. App. 4th 1022, 1031 (1998)).

As to the factual question whether Mr. Chacon did inform Mr. Pakes that he could not be convicted of § 2800.2 or that there was at least a dearth of legal authority on the interpretation of "pursuit" that afforded him a defense to the 2800.2 claim, the Court finds that Mr. Chacon did not so inform Mr. Pakes. On this point, the Court finds Mr. Chacon's testimony that he did inform Mr. Pakes lacks credibility. The Court also finds credible the testimony of Mr. Pakes and his mother, Marilyn Pakes. In addition to the Court's evaluation of the witnesses' demeanor, the Court takes note of the following in support of its conclusion that Mr. Chacon failed to so inform Mr. Pakes:

(1) Mr. Pakes and his mother testified credibly that Mr. Chacon told them that Mr. Pakes would likely be convicted of *both* felony police evasion and felony child endangerment at trial and that he would be sentenced to 50 years to life. *See* Tr. at 391-92, 438 (testimony of Mr. Pakes); Tr. at 384-86 (testimony of Mr. Pakes's mother).

(2) Exhibit X, submitted by Mr. Pakes, corroborates the above testimony of Mr. Pakes and his mother. *See* Pet.'s Ex. X (letter). Exhibit X is a letter that Mr. Pakes wrote to his father in May 2003, several months after he was sentenced. In the letter, Mr. Pakes stated that, had he gone to trial, he "probably" would have gotten 50 years to life. It is unlikely that Mr. Pakes wrote this letter simply to substantiate a claim of ineffective assistance of counsel because the letter was written *before* he had the opportunity to consult with appellate counsel. *See* Tr. at 439-40 (testimony of Mr. Pakes).

(3) The plea bargain that Mr. Pakes received also corroborates the above testimony of Mr. Pakes and his mother. Under the plea, Mr. Pakes received a sentence (excluding the one year sentence for the prison prior) of 25 years to life, the same sentence that he would have received at trial had he been convicted of felony child endangerment but acquitted of felony

evasion of the police. The fact that Mr. Pakes gained nothing substantively from the plea[4] corroborates the conclusion that Mr. Pakes thought he would get 50 years to life if he rejected the plea and went to trial.

(4) There is nothing in Mr. Chacon's case file, including his subject matter file on § 2800.2, indicating that he did any research or thought about this particular issue in this case. Resp.'s Ex. 1(c) (Pakes § 2800 file).

(5) Mr. Chacon did not say anything to the district attorneys on the case about the "pursuit" defense, even at the in-chambers trial conference. *See, e.g.*, Tr. at 567-68 (testimony of Mr. Gibbons-Shapiro) (stating that he could not recall whether Mr. Chacon brought up this issue at the in-chambers trial conference; but adding that, "under the common practice for talking about these things in chambers, . . . [i]t seems less likely than -- not -- that we would have actually had a more full discussion of the actual elements and how those might have played out").

(6) Mr. Chacon prepared no in limine motion or 995 motion on the "pursuit" defense even though there would have been a strategic advantage -- and no correlative risk -- of doing so. Indeed, Mr. Schwartz testified that had he been representing Mr. Pakes, he would have brought a 995 motion "to see whether there [were] sufficient facts that you could get to a jury." Tr. at 315 (testimony of Mr. Schwartz). Even if the § 2800.2(a) count were not dismissed, the district attorneys would be forced to flesh out their position regarding the count. *See* Tr. at 316 (testimony of Mr. Schwartz).)

(7) Mr. Chacon prepared no jury instruction on the meaning of "pursuit" under § 2800.2(a). Although Mr. Chacon gave reasons as to why, in general, he would not prepare jury instructions until after trial began, *see, e.g.*, Tr. 73-74 (testimony of Mr. Chacon), this evidence has some probative value on the question.

(8) At the evidentiary hearing, Mr. Chacon testified that he did not think that the defense could mount a successful defense to the § 2800.2 charge. *See* Tr. at 207 (testimony of Mr. Chacon)

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[4] For a discussion of the lack of any real advantage on the *Romero* motion by pleading guilty, see Part IV.A, *infra*.

(stating that he told Mr. Pakes that the prosecution would have a hard time with proving felony evasion of the police but adding that "I thought that they could still try to prove the three Vehicle Code violations, and that if they did, that they would convict him."). Thus, it is unlikely that Mr. Chacon raised with Mr. Pakes the availability of the defense (*i.e.*, the "pursuit" defense) to the § 2800.2(a) charge.

The Court concludes that, by failing to inform Mr. Pakes about the substantial defense he had to the § 2800.2(a) charge, Mr. Chacon "misinformed him of the likelihood of being convicted under § 2800.2," and thus his "advice amounted to a gross mischaracterization of the likely sentence combined with erroneous advice of the probable outcome of trial." VRW Order of 9/27/06, at 17 (citing *Iaea*, 800 F.2d at 865).

B. Multiple Punishment for Single Criminal Objective (Cal. Pen. Code § 654)

California Penal Code § 654 provides in relevant part that

> [a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, *but in no case shall the act or omission be punished under more than one provision.* An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

Cal. Pen. Code § 654(a) (emphasis added). Mr. Pakes argues that, even if he had been convicted at trial of both felony evasion of the police and felony child endangerment, § 654 would have barred multiple punishment for both crimes. According to Mr. Pakes, Mr. Chacon's performance was deficient because Mr. Chacon did not tell him that § 654 would bar multiple punishment and therefore the plea bargain he entered -- dismissal of the § 2800.2(a) charge in exchange for a guilty plea to the § 273a(a) charge -- was worthless.

As Judge Walker indicated in his September 27 order, § 654 bars multiple punishment when a course of criminal conduct is indivisible,[5] and "[d]etermining [w]hether a course of criminal

[5] *See also People v. Hicks*, 6 Cal. 4th 784, 789 (1993) (noting that § 654 "literally applies only where [multiple] punishment arises out of multiple statutory violations produced by the same act or omission" but that "its protection has been extended to cases in which there are several offenses committed during a course of conduct deemed to be indivisible in time") (internal quotation marks omitted).

conduct is divisible . . . depends on the intent and objective of the actor." VRW Order of 9/27/06, at 18 (internal quotation marks omitted). "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." *Hicks*, 6 Cal. 4th at 789 (internal quotation marks omitted).

In his September 27 order, Judge Walker rejected the state's argument that Mr. Pakes harbored two separate intents in his violation of § 2800.2(a) and § 273a(a). Both crimes were committed "only as part of a single, larger criminal intent: to escape the scene of the highway accident to the supposed safety of his father's house." VRW Order of 9/27/06, at 19. Therefore, § 654 would bar multiple punishment for both the felony police evasion and felony child endangerment charges. The Court finds that the evidence presented at the evidentiary hearing confirms Judge Walker's assessment. At the evidentiary hearing, both Mr. Gibbons-Shapiro and Mr. Schwartz testified that it was likely that § 654 would have stayed one of the felony sentences had Mr. Pakes been convicted of both felony evasion of the police and felony child endangerment. *See* Tr. at 466 (testimony of Mr. Gibbons-Shapiro); Tr. at 295 (testimony of Mr. Schwartz). No one testified to the contrary, and for good reason: in the police reports, Mr. Pakes is said to have stated that he fled the scene because he knew that it was a condition of his parole not to associate with children. *See, e.g.*, Pet.'s Exs. Q, S (police reports). Mr. Gibbons-Shapiro testified that this is what the district attorney believed in prosecuting the case, *see, e.g.*, Tr. at 454, 560 (testimony of Mr. Gibbons-Shapiro), and the evidence from the preliminary examination bears this out -- *e.g.*, Mr. Pakes tried to get Adriene to duck during the case to keep her out of view. *See* Resp.'s Ex. 2 (Prelim. Exam. at 21, 25) (testimony of Adriene).

The Court acknowledges that, at the evidentiary hearing, Mr. Pakes claimed to have a different reason for fleeing the scene. Mr. Pakes -- as well as his father and brother -- stated that he fled the scene because he felt physically threatened by the actions of the person whose car he had hit (*i.e.*, the off-duty police officer). *See* Tr. at 397 (testimony of Mr. Pakes) (stating that "the person I had bumped had gotten verbally abusive with me . . . and the person had chased me"); Tr. at 273-75 (testimony of Mr. Pakes's father) (indicating that Mr. Pakes told him that the person got out of his

car, yelled at Mr. Pakes, and shook his fist at Mr. Pakes); Tr. at 365 (testimony of Mr. Pakes's brother) (stating that the person was "acting irrationally and out of control"). However, Mr. Pakes's testimony as to this point lacks credibility. It is inconsistent with his statements to the police, made shortly after the accident occurred. It is inconsistent with the undisputed testimony that he tried to get Adriene to duck from view. Moreover, Officer Gonzalez, the off-duty police officer, indicated at the preliminary examination that he did not have a chance to get out of the car before Mr. Pakes fled the scene. *See* Resp.'s Ex. 2 (Prelim. Exam. at 50) (testimony of Officer Gonzalez). Officer Gonzalez was not cross-examined and impeached on this point. Accordingly, the Court finds it likely that the trial court would have found that Mr. Pakes had a single objective in fleeing and that his course of conduct was indivisible. Thus, § 654 would have barred multiple punishment for the evasion and endangerment charges and thus would have prevented a 50-to-life sentence.

This Court further finds that Mr. Chacon did not inform Mr. Pakes that "§ 654 might bar conviction and punishment under two separate statutes for the same conduct." VRW Order of 9/27/06, at 20. Mr. Chacon's testimony that he did so notify Mr. Pakes is not credible. As discussed in Part III.A, *supra*, Mr. Pakes believed that he was likely to be convicted of both felony police evasion and felony child endangerment and be sentenced to 50 years to life. Mr. Pakes would not have had that belief had he been informed that § 654 would likely have prevented such a sentence. Moreover, there is nothing in Mr. Chacon's case file indicating that he considered § 654. There are no notes in his file which reference the statute, nor is there a research file on the statute. It is also notable that Mr. Chacon never brought the matter up to the district attorneys or in chambers to the trial judge. *See* Tr. at 568 (testimony of Mr. Gibbons-Shapiro) (stating that he could not recall a discussion of this issue with Mr. Chacon, including in chambers with the presiding judge).

The Court therefore finds that "trial counsel did not inform [Mr. Pakes] that § 654 might bar conviction and punishment under two separate statutes for the same conduct" and thus gave Mr. Pakes "a 'gross mischaracterization' of the likely sentence, falling below the level of competence the Sixth Amendment requires." VRW Order of 9/27/06, at 20 (quoting *Iaea*, 800 F.2d at 865).

C. Felony Child Endangerment (Cal. Pen. Code § 273a(a))

Under § 273a(a), "[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered" is guilty of felony child endangerment. Cal. Pen. Code § 273a(a). A person is guilty of misdemeanor child endangerment when there are "circumstances or conditions *other* than those likely to produce great bodily harm or death." *Id.* § 273a(b) (emphasis added). Mr. Pakes contends that he had a viable defense to the felony charge of child endangerment which his trial attorney, Mr. Chacon, failed to tell him -- more specifically, that he could defend by seeking conviction for the lesser-included offense of misdemeanor child endangerment.

In his September 27 order, Judge Walker indicated that the preliminary issue here is what was the likelihood that the trial judge would have given the jury an instruction on the lesser-included offense. So long as "the question was close," then Mr. Chacon "had an obligation 'to inform [Mr. Pakes] of the dearth of legal authority, and to inform [Mr. Pakes] that the legal evaluation of the case was based thereon.'" VRW Order of 9/27/06, at 21-22 (quoting *Maguire*, 67 Cal. App. 4th at 1031).

At the evidentiary hearing, Mr. Gibbons-Shapiro and Mr. Schwartz both testified that the trial court would have had a *sua sponte* obligation to give the lesser-included-offense instruction. *See* Tr. at 460, 521-24 (testimony of Mr. Gibbons-Shapiro); Tr. at 293-94 (testimony of Mr. Schwartz); *see also People v. Rogers*, 39 Cal. 4th 826, 866 (2006) (stating that the trial court has an obligation to give an instruction on a lesser-included offense "'if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser'"). There was no testimony to the contrary. Mr. Gibbons-Shapiro further testified that, had the trial court failed to do so, then he himself would have urged the trial court to give such an instruction in order to prevent reversible error. *See* Tr. at 521-25 (testimony of Mr. Gibbons-Shapiro).

The above evidence, by itself, establishes that there was a strong likelihood that the trial court would have give an instruction on the lesser-included offense. In addition to the undisputed testimony, the facts clearly support the giving of the instruction because conviction of a lesser-included misdemeanor offense was possible under the facts of the case. The case did not involve a high-speed chase. Although it is undoubtedly risky (not to mention unlawful) to drive on the shoulder at 40-50 mph while other traffic is moving at 30-35 mph, weave in and out of traffic at those speeds, drive the wrong way on a one-way surface street for one block, and drive a child passenger who is not belted, a jury could still have concluded that the prosecution had not proven beyond a reasonable doubt that the "'probability of *serious* injury is *great*.'" *People v. Odom*, 226 Cal. App. 3d 1028, 1033 (1991) (emphasis added). Mr. Schwartz credibly testified that this would have been a good case to raise reasonable doubt as to whether there was a "great" likelihood of "serious" bodily injury. *See* Tr. at 291-92 (testimony of Mr. Schwartz). He testified that many motorists commonly encounter instances of this kind of driving. *See* Tr. at 320 (testimony of Mr. Schwartz) (noting that driving the wrong way on a one-way street is not an uncommon occurrence and does not "always equate to death or imminent likelihood of serious bodily injury"). Moreover, there is a possibility that the lesser offense could have resulted from a compromise jury verdict. *See* Tr. at 292-93 (testimony of Mr. Schwartz).

The Court acknowledges Adriene's testimony at the preliminary examination that, while Mr. Pakes was driving the wrong way on the one-way street, there were on-coming cars (*see* Resp.'s Ex. 2 (Prelim. Exam. at 24-25) (testimony of Adriene), and that, if believed, this would have diminished the likelihood of a misdemeanor conviction. But her testimony does not appear to be credible on this point. A jury could have found that her perceptions were distorted given her excited state of mind at the moment. *See id.* (Prelim. Exam. at 23) (testimony of Adriene) (stating that she was screaming and felt scared); *see also* Tr. at 307-08 (testimony of Mr. Schwartz). Moreover, this testimony by Adriene is completely uncorroborated. *See also* Tr. at 462, 503 (testimony of Mr. Gibbons-Shapiro) (conceding that this part of Adriene's testimony was not corroborated). In fact, none of the police reports, including that written by Sgt. St. Amour, mentions this fact or any near collision. *See, e.g.*, Pet's Ex. O (police report by Sgt. St. Amour). Surely, such a significant fact

would have been reported. Adriene's credibility regarding this matter was especially doubtful given that her testimony about multiple marked police cars in pursuit was likewise problematic. *See also* Tr. at 504 (testimony of Mr. Gibbons-Shapiro) (acknowledging that defense counsel would make this argument to the jury). The Court thus concludes that the trial court would likely have instructed the jury on the lesser-included offense of misdemeanor child endangerment.

As to the factual question of whether Mr. Chacon informed Mr. Pakes of the possibility of a misdemeanor rather than a felony conviction, this issue is a closer question than those presented above. Mr. Pakes's father and mother testified that they thought that the plea bargain and subsequent *Romero* motion could have resulted in a misdemeanor conviction. *See, e.g.*, Tr. at 261 (testimony by Mr. Pakes's father) (stating that Mr. Chacon "was going to recommend to my son to plead guilty" and "he would try to maneuver the Court into reducing it to some misdemeanor, with a *Romero* hearing"); Tr. at 268 (testimony by Mr. Pakes's father) ("I remember [Mr. Chacon] one time saying that, 'Oh, I got a good judge . . .' and that he felt that he could be able to . . . get the judge to lower . . . to a misdemeanor"); Tr. at 270-71 (testimony by Mr. Pakes's father) (noting the same); Tr. at 383-84 (testimony by Mr. Pakes's mother) (stating that Mr. Chacon told her that, "if my son pled guilty, there could possibly be a charge that could be dropped and it would be reduced to a misdemeanor"); Tr. at 385 (testimony by Mr. Pakes's mother) (noting the same). Although not accurate (since the *Romero* motion would only have eliminated one strike prior), it suggests that perhaps the possibility of a misdemeanor may have been mentioned in some context by Mr. Chacon.

However, the Court nonetheless finds that Mr. Chacon did not inform Mr. Pakes of this possibility. Although Mr. Chacon testified that he did tell Mr. Pakes about this possibility, Mr. Pakes and his mother testified to the contrary on this point. Having observed the witnesses' demeanor, the Court finds the Pakeses' testimony on this point more credible than Mr. Chacon's.

Moreover, the Court's finding that Mr. Chacon failed to tell Mr. Pakes about the possibility of a misdemeanor conviction is again corroborated by the fact that Mr. Pakes appeared convinced that he would get 50 years to life if convicted at trial. This indicates that Mr. Pakes was not aware at the time of the plea of the possibility of conviction for misdemeanor as opposed to felony

endangerment. Moreover, in his presentation of the case to the trial court in chambers, there is no evidence that Mr. Chacon argued for a misdemeanor conviction. *See* Tr. at 568 (testimony of Mr. Gibbons-Shapiro) (stating that he could not recall whether Mr. Chacon said anything during the in-chambers conference with the presiding judge about this issue). In fact, at the evidentiary hearing herein, Mr. Chacon testified that, based on the facts he ascertained from his investigation, the § 273a(a) charge did not "look good," Tr. at 82 (testimony of Mr. Chacon), and that the lesser-included offense would have been a "tough sell." Tr. at 83 (testimony of Mr. Chacon). Mr. Chacon also testified that the likelihood of a felony conviction was "very high." Tr. at 93 (testimony of Mr. Chacon); *see also* Tr. at 95 (testimony of Mr. Chacon) (stating that conviction was "very, very likely"); Tr. at 143 (testimony of Mr. Chacon) (same). Thus, it would appear from Mr. Chacon's own testimony that he did not give the lesser-included-offense defense much credence. *See also* Tr. at 168-69 (testimony of Mr. Chacon) (stating that conviction on misdemeanor child endangerment -- *i.e.*, instead of felony child endangerment -- was "very, very unlikely" and that an argument that there was not a great likelihood of serious bodily injury was not "very plausible"). This suggests that Mr. Chacon did not raise the defense with Mr. Pakes.

The Court acknowledges that Mr. Chacon did have a general research file on § 273a which contained a handwritten citation to the *Odom* case (although not an actual copy of *Odom*). *See* Resp.'s Ex. 1(d). However, this is not persuasive evidence that Mr. Chacon considered and then informed Mr. Pakes of the defense. The § 273a research file was a "generic" file, *i.e.*, a file not particular to this case, but a subject matter file kept in the course of his general practice, and there is nothing in writing indicating when the *Odom* notation was made. *See* Tr. at 50 (testimony of Mr. Chacon); Resp.'s Ex. 1(d) (§ 273 file). Because the file was not turned over to Mr. Pakes's habeas counsel until some time after October 2003, *see* Tr. at 49-51 (testimony of Mr. Chacon); Pet.'s Ex. L (letter), the notation could have been made after Mr. Chacon's work on Mr. Pakes's case. Moreover, the notation makes no reference to the relevance or significance of *Odom*. Apart from this one handwritten citation to *Odom*, there is nothing in Mr. Chacon's records evincing any awareness or study of the misdemeanor defense in Mr. Pakes's case.

The Court also acknowledges that, during the allocution at the plea hearing, Judge Lee specifically asked Mr. Pakes the following questions -- "Have you had enough time to discuss this case thoroughly with your attorney?" and "Did the two of you talk about the specific elements the D.A. would have to prove against you as well as the possible defenses that you might have?" -- to which Mr. Pakes responded, "Yes, I have sir" and "Yes, he did, sir." Resp.'s Ex. 3 (Plea Hrg. at 6). At the evidentiary hearing, Mr. Pakes initially stated on cross-examination that he was answering Judge Lee's questions truthfully. *See* Tr. at 426-28 (testimony of Mr. Pakes). Later, however, he backtracked and explained that he was only saying "yes" because Mr. Chacon told him to respond that way -- *i.e.*, he was taking his cues from Mr. Chacon during the allocution. *See* Tr. at 427-29, 432-33, 436-37 (testimony of Mr. Pakes). The Court does not find the latter portion of Mr. Pakes's testimony credible. The testimony is inconsistent with his initial answers on cross-examination. In addition, Mr. Pakes hesitated and equivocated on the stand herein in giving the latter testimony. Furthermore, it is notable that, at the plea hearing, Mr. Pakes did not give a simple "yes" response to Judge Lee's questions, as one might expect if he was answering purely on cue. His actual responses -- "Yes, I have sir" and "Yes, he did, sir" -- appear more volitional and spontaneous rather than dictated and rehearsed.

Moreover, as the Supreme Court held in *Blackledge v. Allison*, 431 U.S. 63 (1977), "the representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." *Id.* at 73-74.

However, even assuming that Mr. Chacon had some discussion with Mr. Pakes about the specific elements the prosecution would have to prove and the possible defenses to the charges as Mr. Pakes arguably acknowledged in his response to Judge Lee, that does not establish that Mr. Chacon imparted to Mr. Pakes information about the specific misdemeanor defense at issue here.[6] Nor does it establish that Mr. Chacon -- if he discussed the misdemeanor defense with Mr. Pakes --

[6] The Court's ruling in this regard applies as well to its finding that Mr. Pakes was not informed of the defense to § 2800.2(a) and the bar on multiple punishment under § 654.

did so adequately. In other words, Mr. Pakes could well have had an *incomplete* understanding of the charges and all available defenses even though, in his own mind, he believed himself fully informed. Based on the above, including Mr. Pakes's evident belief that he would likely have been convicted and sentenced to 50 years to life at trial, the Court finds that Mr. Pakes was not fully informed of his defenses, even if he believed that he had been so informed at the time of the plea.

In sum, the Court finds that there was a strong likelihood that "the trial court would . . . have instructed the jury on the lesser included offense of misdemeanor child endangerment and that his counsel [Mr. Chacon] acted beyond the range of professional competence in failing to inform [Mr. Pakes] of that possibility." VRW Order of 9/27/06, at 22. The Court also finds Mr. Chacon did not inform Mr. Pakes about the viability of this defense. Accordingly, Mr. Chacon's "recommendation that [Mr. Pakes] plead guilty to a third strike felony where a conviction for a lesser included misdemeanor was also possible was a further 'gross mischaracterization' of the likely outcome, given that a conviction for misdemeanor child endangerment would not have triggered application of California's three strikes law." *Id.* at 22 (quoting *Iaea*, 800 F.2d at 865).

D. *Romero* Motion

As Judge Walker noted in his September 27 order, "[i]n *People v. Superior Court (Romero)*, 13 Cal. 4th 497 (1996), the California Supreme Court held that trial courts retain discretion under California Penal Code § 1385(a) to strike prior felony conviction allegations in cases brought under California's three strikes statute 'in furtherance of justice.'" VRW Order of 9/27/06, at 22-23. Mr. Pakes argues that Mr. Chacon's performance was deficient because Mr. Chacon told him that Judge Lee is a lenient judge likely to grant a *Romero* motion (which would result in less than a life sentence) when, in fact, Judge Lee is a harsh judge and there was no chance that Judge Lee or any other judge would grant *Romero* relief given Mr. Pakes's record and the circumstances underlying the current charges.

Judge Lee ultimately did deny the *Romero* motion filed by Mr. Chacon. However, before the motion was brought, Judge Lee

> "told [petitioner's] attorney that [he] would give serious consideration to the *Romero* motion." At that time, he also stated to petitioner that the "circumstances of this [child endangerment] crime are relatively

> moderate, maybe even almost minor," and that petitioner's future appeared to be "reasonably promising." But Judge Lee had not yet "read the police reports or the preliminary examination or anything like that," and he stressed, "I can't make promises."

VRW Order of 9/27/06, at 23-24.

In his September 27 order, Judge Walker explained that the factual issue to be explored with respect to the *Romero* motion is as follows: whether Mr. Chacon gave Mr. Pakes advice that "clouded [his] understanding of Judge Lee's on-the-record statements and/or failed to advise him adequately of the relative risks of going to trial versus gambling on the outcome of a *Romero* motion." VRW Order of 9/27/06, at 24.

There is, once again, a square conflict in testimony between Mr. Pakes and Mr. Chacon as to whether Mr. Pakes was told that Judge Lee would likely grant the *Romero* motion. In the May 2003 letter that Mr. Pakes wrote to his father, Mr. Pakes stated that Mr. Chacon advised him "to plead guilty to the endangerment and and [sic] the DA would *not* throw in the evading arrest, and then we can take our chances at a Romero hearing, cause he said I had a lot in my favor and he felt the judge would drop a strike." Pet.'s Ex. X (letter) (emphasis in original). For the reasons previously stated, the Court finds this letter persuasive evidence of Mr. Pakes's true knowledge and state of mind.

At the very least, as discussed below, the Court finds persuasive Mr. Schwartz's testimony that the chances of Judge Lee granting the *Romero* motion (given the facts of the case) were "[s]lim to none." Tr. at 297 (testimony of Mr. Schwartz). Even if Mr. Chacon did not tell Mr. Pakes that the trial court would probably grant the motion, the Court finds that Mr. Chacon did not adequately convey to Mr. Pakes how highly unlikely it was that the trial court would grant such a motion. The Court finds that, despite Judge Lee's on-the-record statements, Mr. Pakes's understanding of the likelihood of having the motion granted and the relative risks of going to trial versus gambling on the outcome of the *Romero* motion was in fact clouded by Mr. Chacon's advice.

IV. PREJUDICE

As noted in Judge Walker's order of September 27, even if counsel's advice was not "within the range of competence demanded of attorneys in unusual cases" (VRW Order of 9/27/06, at 24, *quoting Strickland*), Mr. Pakes still must show prejudice. Mr. Pakes can satisfy the prejudice prong

of the *Strickland* test "by showing that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have chosen to go to trial." VRW Order of 9/27/06, at 25.

A. Felony Count for Evasion of the Police (Cal. Veh. Code § 2800.2(a))

At the evidentiary hearing, Mr. Pakes testified that he would not have pled guilty if he had known that he would not be convicted of evasion of the police under § 2800.2(a). *See* Tr. at 393 (testimony of Mr. Pakes). The Court credits this testimony. That finding is supported by the fact that if Mr. Pakes could not have been convicted for evasion of the police, and thus only subject to conviction for felony child endangerment, his sentence after trial would only have been (putting aside the prison prior one year sentence) only 25 years to life -- which is exactly what the got from the plea bargain. Therefore, the plea bargain was essentially worthless. Mr. Pakes had nothing to lose by going to trial, *except* for the possibility that a *Romero* motion made after a plea would be in a better posture (*i.e.*, would more likely be granted) than a *Romero* motion made after a full trial and conviction.

Mr. Chacon claimed that, in general, there is such an advantage. *See, e.g.*, Tr. at 85-88, 90-92, 202-03, 212-13 (testimony of Mr. Chacon); *see also* Tr. at 470-71, 473-74 (testimony of Mr. Gibbons-Shapiro) (also claiming an advantage). *But see* Tr. at 332, 334 (testimony of Mr. Schwartz) (stating that whether there would be a better chance at getting a *Romero* motion granted before trial is a consideration but not "the overriding consideration of whether to go to trial or not"). However, any such advantage would be virtually worthless if Mr. Pakes had a slim-to-none chance of getting that motion granted even after a plea rather than trial. The Court finds that, in fact, Mr. Pakes's chances of having the *Romero* motion granted were in fact slim to none and that there was no material advantage in entering the plea versus going to trial with respect to the *Romero* motion.

In this respect, the Court finds credible and persuasive the testimony of Mr. Schwartz as to why it was highly unlikely that any judge would have granted a *Romero* motion in Mr. Pakes's case. *See* Tr. at 299 (testimony of Mr. Schwartz) ("I can think of no judge in the state, not only the county, that would ever grant a *Romero* motion under these particulars."); *see also* Tr. at 297, 353 (testimony of Mr. Schwartz) (stating that the chances of Judge Lee granting the *Romero* motion were "slim to none" or "zero"). First, as Mr. Schwartz testified, Mr. Pakes had two serious felony

prior convictions. *See* Tr. at 297 (testimony of Mr. Schwartz). Judge Lee acknowledged that the facts of these priors were "obviously pretty horrible." Resp.'s Ex. 3 (Plea Hrg. at 4). The circumstances of the current offense, *i.e.*, being in the company of an unaccompanied 12-year-old girl, were similar to the circumstances in one of the priors, which involved the molestation of Mr. Pakes's 9-year-old cousin. *See also* Tr. at 297-99, 344-46, 348-49 (testimony of Mr. Schwartz). Mr. Gibbons-Shapiro pointed out at the evidentiary hearing herein as he did in his recital of the facts in chambers before Judge Lee (on the first day of the trial, which ultimately turned into the plea hearing), Mr. Pakes's modus operandi in each situation was disturbingly similar. Both times Mr. Pakes befriended the parents of the girl in order to get close to the girl. Both times he ingratiated himself with the girl by giving gifts or driving lessons. Both times he started by asking the girl for a kiss. Mr. Gibbons-Shapiro testified it was clear that Mr. Pakes was "grooming" Adriene for molestation, just as he had groomed his 9-year-old cousin. *See* Tr. at 453 (testimony of Mr. Gibbons-Shapiro).

Second, as Mr. Schwartz testified, Mr. Pakes was still on parole at the time of the current offense and, in fact, had committed two prior parole violations prior to the event at issue. *See* Tr. at 297 (testimony of Mr. Schwartz); *see also* Resp.'s Ex. 1(d) (Tab 5, at 128) (probation report). Moreover, in this instance, Mr. Pakes had violated a special condition of parole of which he was well aware -- that he was not to be alone in the company of a minor. *See* Tr. at 297 (testimony of Mr. Schwartz).

Thus, as Mr. Schwartz credibly testified, an analysis of the appropriate factors to consider under *People v. Williams*, 17 Cal. 4th 148, 161 (1998) -- namely, the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects -- all militated strongly against granting the *Romero* motion. It is extremely unlikely that a judge would have found that, under the circumstances as described above, Mr. Pakes to be outside the "spirit" of the three strikes law and hence treated as though he had not previously been convicted of one or more serious felonies. *Id.* Indeed, at the *Romero* hearing, Judge Lee stated:

> The [California] Supreme Court [in *Williams*] told me that, among other things, I'm supposed to consider the facts and circumstances of the strike priors. And here I think even Mr. Chacon concedes they are about as ugly a set of facts that we've come across in quite some time in this county. They're horrible. They're horrendous. They're things that should not have happened in anybody's worst nightmare, and happened to that cousin of yours. Not a lot of good things going there.

Resp.'s Ex. 7 (*Romero* Hrg. at 268).

While further commenting on Mr. Pakes's apparent lack of insight and lack of ability to control his impulses, Judge Lee also noted that Mr. Pakes's prospects for continued good behavior were not favorable given his two prior violations of parole. *See id.* (*Romero* Hrg. at 269).

Judge Lee then went on to state:

> Of course I'm supposed to consider the circumstances of this offense, and there is much truth in Mr. Chacon's remarks that had you not been convicted of what you had been convicted of, and had you not had who you had with you, this might have well been resolved at a misdemeanor level of some sort of chase or traffic offense. But you know what? You can't separate those, because you weren't convicted of the traffic offenses. You stand before me convicted by plea of endangering the health of a minor. This minor was a 12-year-old girl, and that is frightening. Out of all the human beings in this county that could have been in that car, it was a 12-year-old girl who had no idea that you had brutally molested, forcibly, another preadolescent female not very long ago. She was someone who was entrusted to you by parents who had not been told that you had brutally molested another preadolescent female in this county not so very long ago.
>
> There's nothing to suggest to me that when you get out on parole, that it won't happen again, except that I don't think you're going to get out on parole any time soon.
>
> Accordingly, I'm unable to find that you are outside the spirit of the three-strikes law. Indeed, I suspect that you are well within the spirit of the three-strikes law. The Romero motion is, accordingly, denied.

Id. (*Romero* Hrg. at 270-71).

Except for Mr. Pakes's interview with probation, all of the above facts relied upon by Judge Lee were known at the time of the plea and were unchangeable. While a better interview with probation might have helped Mr. Pakes's case, the Court concludes that the circumstances of the prior conviction, the circumstances of the current offense, and the parole violations were overwhelming factors that, in any reasonable assessment by counsel, would have made the prospect of obtaining relief under *Romero* extremely unlikely.

Notably, Mr. Gibbons-Shapiro testified that he could not recall any instance in which Judge Lee had previously granted a *Romero* motion. *See* Tr. at 553 (testimony of Mr. Gibbons-Shapiro) (stating that, in his three strike cases before Judge Lee, Judge Lee had not granted a *Romero* motion). Nor could Mr. Gibbons-Shapiro recall any instance in which Judge Lee had granted a *Romero* motion which involved similar circumstances, *i.e.*, a prior sex offense involving a minor and a current offense with circumstances suggestive of sexual design on another child. *See* Tr. at 553-54 (testimony of Mr. Gibbons-Shapiro) (stating that he did not know whether Judge Lee had ever granted a *Romero* motion on similar facts -- *i.e.*, priors involved sexual conduct with a minor and current offense involved another minor and social contact). The state presented no evidence of any other Santa Clara Superior Court judge granting a *Romero* motion under such circumstances.

In light of the above, there was no material advantage for Mr. Pakes to enter the plea. The *Romero* motion would likely have suffered the same fate whether made after plea or after trial. Since, for the reasons stated above, Mr. Pakes would not have been sentenced to more than 25 years to life for felony child endangerment if convicted at trial (conviction on the § 2800.2(a) count was highly unlikely), he gained nothing from the plea. Accordingly, the Court concludes that there are no "other circumstances surrounding the pre-trial proceedings and negotiations would have diminished the reasonable probability of [Mr. Pakes's] insisting on going to trial." VRW Order of 9/27/06, at 25.

The Court also credits Mr. Pakes's testimony that he would have opted for trial because Mr. Pakes previously rejected a plea bargain that offered him a 25-to-life sentence. In March 2002, when the felony charges against Mr. Pakes were child annoyance or molestation, *see* Cal. Pen. Code § 647.6(c)(2), and child endangerment, *see id.* § 273a(a) -- *i.e.*, the felony charge for evasion of the police had not yet been added -- Mr. Pakes was potentially subject to a maximum sentence of 50 years to life if convicted at trial. The prosecution offered Mr. Pakes a sentence of 25 years to life if he would plead guilty to the § 647.6(c)(2) count, but Mr. Pakes rejected that offer. *See* Resp.'s Ex. 1(a) (Tab 10); Tr. at 230-31 (testimony of Mr. Chacon). At the evidentiary hearing, Mr. Chacon suggested that Mr. Pakes rejected the offer only because, if he pled guilty to the § 647.6(c)(2) count, his chances with a *Romero* motion were "slim to none," Tr. at 231 (testimony of Mr. Chacon), but,

as discussed above, that would be true if he pled guilty to the § 273a(a) count as well. Although Mr. Chacon testified Mr. Pakes was afraid to go to trial and wanted to plea, the Court does not credit that testimony. Mr. Pakes had already shown a willingness to reject a plea bargain in favor of trial.

Finally, even if Mr. Pakes had expressed reluctance to go to trial, as Mr. Chacon so testified, *see, e.g.*, Tr. at 99 (testimony of Mr. Chacon) (stating that "Mr. Pakes was not someone eager to go to trial"); Tr. at 113 (testimony of Mr. Chacon) (stating that Mr. Pakes "was very afraid of going to trial"), that reluctance would have been infected by Mr. Chacon's failure to fully inform Mr. Pakes of his defenses. Both Mr. Pakes and his family (at least his mother) were under the mistaken belief that he would likely be convicted on both felony evasion of the police and felony child endangerment and sentenced to a minimum of 50 years to life in prison. So viewed, the issue, therefore, is not whether Mr. Pakes was reluctant to go to trial; rather, the issue is whether there is a reasonable probability that Mr. Pakes would have rejected the plea bargain and opted for trial had he been fully informed of his defenses and the likely outcome at trial versus a plea bargain. The Court finds that there is such a reasonable probability.

The Court notes that, in *Hill*, the Supreme Court stated that, "[i]n many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Hill*, 474 U.S. at 59. Of course, unlike an ineffective assistance claim directed at performance at trial, the prejudice inquiry in an ineffective assistance claim relating to a guilty plea "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process," *Hill*, 474 U.S. at 59, not the probable outcome of trial. Thus, the merits of a potential defense is relevant only insofar as it informs whether "there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial." *Id.* "[W]hether the affirmative defense likely would have succeeded at trial" in turn informs whether the affirmative defense "would have led counsel to change his recommendation as to the plea." *Id.* Hence, although the prejudice inquiry in this context resembles the prejudice inquiry in ineffective assistance challenges to convictions obtained through a trial, the two are not identical. In some circumstances, a court could well conclude that there is a reasonable probability that the defendant

would have opted for trial even if it was less than certain or even probable that the affirmative defense would have succeeded at trial. Where, as here, the defendant had *nothing* to gain by entering the plea, proof that an affirmative defense had a reasonable or even decent chance of success at trial could be sufficient to prove prejudice in the context of a plea.

In any event, whatever the precise standard may be, the Court concludes that it is met here. As Judge Walker's order of September 27 indicates, the § 2800.2(a) defense likely would have succeeded given the probable definition of "pursuit" and the lack of three traffic violations (warranting a point) incurred during the pendency of the pursuit. There was substantial merit to the defense.

B. Multiple Punishment for Single Criminal Objective (Cal. Pen. Code § 654)

As above, Mr. Pakes can satisfy the prejudice prong of the *Strickland* test "by showing that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have chosen to go to trial." VRW Order of 9/27/06, at 25.

At the evidentiary hearing, Mr. Pakes testified credibly that he would not have pled guilty if Mr. Chacon had told him that § 654 would bar multiple punishment if he were convicted of both felony evasion of the police and felony child endangerment at trial. *See* Tr. at 393 (testimony of Mr. Pakes). The same analysis above, *see* Part IV.A, *supra*, is applicable here. That is, if § 654 would bar multiple punishment for both crimes, then at most, Mr. Pakes could be sentenced to only 25 years to life -- which is exactly what the got from the plea bargain. Therefore, the plea bargain was essentially worthless. Mr. Pakes had nothing to lose from going to trial, *except* for the possibility that a *Romero* motion made after a plea would be in a better posture (*i.e.*, would more likely be granted) than a *Romero* motion made after a full trial. However, there was no material advantage for Mr. Pakes to enter the plea because the *Romero* motion would likely have suffered the same fate whether after plea or after trial Thus, the Court finds there is a reasonable probability that Mr. Pakes would have rejected the plea bargain and chosen to go to trial if Mr. Chacon had informed him about the § 654 defense.

Moreover, similar to above, to the extent that the prejudice inquiry depends on whether the § 654 defense likely would have succeeded at trial, that requirement has been met. All of the

witnesses agreed that Mr. Pakes would not likely have been punished for both crimes had he been convicted of both.

C. Felony Child Endangerment (Cal. Pen. Code § 273a(a))

As above, Mr. Pakes can establish prejudice for purposes of the *Strickland* test by showing that "there was a 'reasonable probability' that [he] would have pled guilty absent counsel's failure to advise him of the possibility of conviction of a lesser included misdemeanor." VRW Order of 9/27/06, at 28.

At the evidentiary hearing, Mr. Pakes testified credibly that he would not have pled guilty if he had been told about the possibility of being convicted only of the lesser-included misdemeanor offense for child endangerment. *See* Tr. at 393 (testimony of Mr. Pakes). This claim is credible given that, under the plea bargain, Mr. Pakes agreed to a felony sentence for child endangerment (25 years to life) instead of a misdemeanor sentence, which for the reasons stated above, is no better than the worst result he would have obtained at trial. In short, he had nothing to lose by going to trial and seeking conviction on the misdemeanor count.

To the extent that the prejudice inquiry depends on whether the misdemeanor defense likely would have succeeded at trial, that requirement has been met here. Although a closer question, there is a reasonable chance that a jury would have convicted Mr. Pakes of a misdemeanor rather than a felony. As Mr. Schwartz testified, arguably, Mr. Pakes's driving was not much worse than that which is not uncommonly encountered by motorists -- *e.g.*, driving the wrong way on a one-way street is not an uncommon occurrence and does not "always equate to death or imminent likelihood of serious bodily injury." Tr. at 320 (testimony of Mr. Schwartz). And as found above, Adriene's testimony about the most dangerous action taken by Mr. Pakes -- driving the wrong way on a one-way street into oncoming traffic -- was not credible.

D. *Romero* Motion

In his order of September 27, Judge Walker concluded that, even if Mr. Chacon had rendered ineffective assistance in providing Mr. Pakes with advice about the likelihood of success on a *Romero* motion, Mr. Pakes suffered no prejudice directly therefrom because "Judge Lee clearly told [Mr. Pakes] that he would only decide the *Romero* motion after reviewing [Mr. Pakes's] full record,

including the probation report containing a description of [his] past convictions." *Id.* at 28-29. Given that Mr. Pakes stated at the plea hearing that no one made any promises about the case and that Judge Lee clearly explained to him what he would consider in deciding the *Romero* motion, "[Mr. Pakes] suffered no prejudice from counsel's potentially inaccurate advice regarding the *Romero* motion alone." *Id.* at 29.

Judge Walker also found, however, that "[Mr. Pakes] might be able to establish prejudice if his counsel failed to inform him that Judge Lee would decide the *Romero* motion based on [Mr. Pakes's] entire record -- including his past convictions -- whereas a jury deciding only the § 273a charge might never have learned of these convictions." *Id.* Judge Walker thus concluded that, at the evidentiary hearing, "[Mr. Pakes] may attempt to prove that his counsel failed to advise him of the likely inadmissibility of his prior convictions at trial . . . and that he would not have pled guilty if he had received this advice from this attorney." *Id.*

The first question for this Court therefore is whether Mr. Chacon failed to advise Mr. Pakes that the prior convictions were likely inadmissible at trial. In this regard the Court first finds that the prior convictions were in fact likely inadmissible at trial. Evidence of Mr. Pakes's parole violation -- and hence the convictions underlying the parole -- was irrelevant because child endangerment is a general intent crime requiring no evidence of motive, and, in any event, would likely have been excluded as highly prejudicial under California Evidence Code § 352.

Mr. Gibbons-Shapiro testified that, in his opinion, evidence of the prior convictions or at least the fact that Mr. Pakes was subject to a parole condition that he not be alone with a child would have been admitted at trial. *See* Tr. at 454-57, 559-63 (testimony of Mr. Gibbons-Shapiro). However, as stated above, child endangerment is a general intent crime to which motive is irrelevant. The issue is whether the conduct engaged in by the defendant may, as an objective matter, be found to have created a great "'probability of serious injury.'" *Odom*, 226 Cal. App. 3d at 1033. Mr. Gibbons-Shapiro testified that, nonetheless, motive (*i.e.*, to avoid being caught with Adriene in violation of his parole condition) was relevant to credibility -- to show that, because he was so motivated, he did in fact drive recklessly. But in this case, Mr. Pakes would not have testified at trial. *See* Tr. at 130, 133 (testimony of Mr. Chacon)). Thus, his credibility would not

have been at issue. Even if Mr. Pakes's motive might have had some probative value as to how he actually drove, that probative value was extremely marginal. Except for the discrepancies as to whether Mr. Pakes encountered any oncoming traffic, there was no real dispute as to how he drove. The marginal, if any, probative value of Mr. Pakes's motive would have been clearly outweighed by the obvious prejudicial effect of admitting the prior conviction for molestation. Although Mr. Gibbons-Shapiro testified that he believed that at least the fact that Mr. Pakes was on parole subject to a special condition (*i.e.*, that he not be alone with a minor) would have come in, even that limited evidence would have been very prejudicial. It would not have taken much for the jury, hearing of such a parole condition, to conclude that Mr. Pakes was a convicted sex offender. Thus, the evidence of the prior convictions and the parole condition likely would have been excluded as irrelevant and/or unfairly prejudicial under California Evidence Code § 352. *See also* Tr. at 328-29 (testimony of Mr. Schwartz) (stating that the trial judge would have excluded even evidence that Mr. Pakes fled the scene because he was on parole (*i.e.*, not stating what the prior conviction was for) as too highly prejudicial).

The Court further finds that in fact Mr. Chacon failed to inform Mr. Pakes about the likely inadmissibility of the prior convictions at trial. In April 2002, Mr. Chacon received a letter from the prosecution, which stated that the prosecution intended to introduce the prior convictions at the preliminary hearing and at trial. *See* Pet.'s Ex. M (letter). Mr. Chacon never responded in writing to the letter, nor did he file a written opposition to the prosecution's motion in limine. *See* Pet.'s Ex. U (motion). Although Mr. Chacon moved to continue the trial in August 2002 in order to, *inter alia*, move to strike the priors, *see* Resp.'s Ex. 1(a) (Tab 4), he never made any such motion. *See* Tr. at 70 (testimony of Mr. Chacon). These facts indicate that, at the very least, the issue was not a high priority for Mr. Chacon and therefore lessens the likelihood that he would have brought up the issue with Mr. Pakes. Mr. Pakes testified that he was not aware that the jury would not hear about his prior convictions at trial. *See* Tr. at 394 (testimony of Mr. Pakes). The Court finds that Mr. Chacon did not inform Mr. Pakes about the likely inadmissibility of the prior convictions at trial.

As to whether Mr. Pakes would not have pled guilty had he received this advice from Mr. Chacon, there is no evidence on this particular point. Mr. Pakes did not so testify, and it is not

obvious that this point alone was so material that it in and of itself would likely have led Mr. Pakes to reject the plea bargain. Accordingly, the Court finds that there is not a reasonable probability that Mr. Pakes would have refused the plea and opted for trial on this issue alone.

However, the fact that Mr. Chacon failed to inform Mr. Pakes about the likely inadmissibility of the prior convictions strengthens the above findings of prejudice flowing from the failure of Mr. Chacon to fully inform Mr. Pakes of his affirmative defenses (*i.e.*, the § 2800.2(a) defense, the § 654 defense, and the misdemeanor defense). The fact that Mr. Pakes could have proceeded to trial with a likelihood that the priors would have been excluded enhanced the chance of a favorable outcome with the jury and thus increased the chances that Mr. Pakes, if adequately informed, would have opted for trial.

V. FINDINGS

The Court's findings above are summarized as follows.

A. Felony Count for Evasion of the Police (Cal. Veh. Code § 2800.2(a))

1. There were no other marked police cars giving chase to Mr. Pakes before he passed Sgt. St. Amour.

2. Mr. Chacon failed to inform Mr. Pakes that he could not be convicted of the § 2800.2(a) charge.

3. Mr. Chacon did not inform Mr. Pakes of the dearth of legal authority on the interpretation of § 2800.2(a).

4. Mr. Pakes was not aware that he had a substantial defense for the § 2800.2(a) charge.

5. Mr. Chacon had an opportunity to bring a motion under California Penal Code § 995 to test or clarify the § 2800.2(a) charge, but failed to do so.

6. Mr. Pakes's "trial counsel misinformed him of the likelihood of being convicted under § 2800.2," and "trial counsel's advice amounted to a gross mischaracterization of the likely sentence combined with erroneous advice on the probable outcome of a trial," thereby failing to meet the level of competence required under the Sixth Amendment. VRW Order of 9/27/06, at 17.

7. If Mr. Pakes had been sufficiently informed about the likelihood of being convicted of the § 2800.2 charge, there is a reasonable probability that he would have insisted on going to trial.

B. Multiple Punishment for Single Criminal Objective (Cal. Pen. Code § 654)

8. Section 654 would probably have barred multiple punishment had Mr. Pakes been convicted at trial of both felony charges of evasion and endangerment.

9. Mr. Chacon failed to inform Mr. Pakes prior to entering the plea bargain that "§ 654 might [or would likely] bar conviction and punishment under two separate statutes for the same conduct," and thus gave Mr. Pakes a "'gross mischaracterization' of the likely sentence, falling below the level of competence the Sixth Amendment requires." VRW Order of 9/27/06, at 20.

10. If Mr. Pakes had been sufficiently informed about the likelihood that § 654 would bar multiple punishment, there is a reasonable probability that he would insisted of going to trial.

C. Felony Child Endangerment (Cal. Pen. Code § 273a(a))

11. It is probable that the trial judge would have given the jury an instruction on the lesser-included offense of misdemeanor child endangerment.

12. Mr. Chacon failed to inform Mr. Pakes about the possibility that "the trial count would likely have instructed the jury on the lesser included offense of misdemeanor child endangerment," and thus "his counsel acted beyond the range of professional competence." VRW Order of 9/27/06, at 22.

13. Mr. Chacon failed to advise Mr. Pakes about the possibility of conviction of a lesser included misdemeanor and thus imparted a "'gross mischaracterization' of the likely outcome, given that a conviction for misdemeanor child endangerment would not have triggered application of California's Three Strikes Law." VRW Order of 9/27/06, at 22.

14. If Mr. Pakes had been advised of the possibility of conviction of a lesser included misdemeanor child endangerment, there is a reasonable probability that he would have insisted on going to trial.

D. *Romero* Motion

14. Mr. Chacon did not adequately convey to Mr. Pakes how highly unlikely it was that the trial court would grant the *Romero* motion after the plea.

15. Mr. Chacon gave Mr. Pakes advice "that clouded petitioner's understanding of Judge Lee's on-the-record statements and [ ] failed to advise him adequately of the relative risks of going to trial versus gambling on the outcome of a *Romero* motion." VRW Order of 9/27/06, at 24.

16. The chances of winning the *Romero* motion were slim to none.

17. Given the on-the-record comments of Judge Lee, Mr. Pakes was not prejudiced by Mr. Chacon's failure to fully advise him on the *Romero* motion. *See* VRW Order of 9/27/06, at 29.

18. Mr. Chacon failed to inform Mr. Pakes "that Judge Lee would decide the *Romero* motion based on petitioner's entire record – including his past convictions – whereas a jury deciding only the § 273a charge might never have learned of those convictions." VRW Order of 9/27/06, at 29.

19. It is likely that the prior convictions and the special parole condition that Mr. Pakes not be alone with a minor would have been excluded from the jury at trial.

20. There is not a reasonable probability that Mr. Pakes would have refused the plea and opted for trial had he been so informed of the likely inadmissibility of his prior convictions (putting aside the effect of that failure upon the prejudice resulting from Mr. Chacon's failure to inform Mr. Pakes of his other defenses).

VI. RECOMMENDATION

Based on the above, this Court recommends that Mr. Pakes's petition for a writ of habeas corpus be granted because Mr. Pakes was not afforded effective assistance of counsel when he entered the plea bargain, and he was prejudiced by counsel's deficient performance.

Dated: January 29, 2007

EDWARD M. CHEN
United States Magistrate Judge